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No. 80-2159

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

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ROBERT C. LEHMAN,
Petitioner,

v.

E. B. WEISS,
Respondent.

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On Petition for A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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E. B. Weiss herewith submits his Brief in Opposition to Petitioner's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## REASONS FOR DENYING THE WRIT

The question of Federal law decided by the Circuit Court in this case is consistent with applicable decisions of this Court. The decision does not conflict with decisions of other Federal Courts of Appeals, nor does it so far depart from the accepted and usual course of judicial proceedings in this type of case as to call for an exercise of this Court's power of supervision.

The Circuit Court correctly analyzed the availability of a Bivens-type damage remedy in this type of case. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). This case involves a Fifth Amendment violation. There is no congressional declaration that persons in Weiss' position be remitted to another remedy. There are no special factors counseling hesitation in applying a Bivens-type remedy. The cases of Carlson v. Green, 446 U.S. 14 (1980) and Davis v. Passman, 442 U.S. 228 (1979) are directly controlling.

The case of Parratt v. Taylor, 49 U.S.L.W. 4509 (May 18, 1981) does not require granting of the Writ in this case. Parratt involved suit against a state employee under 42 U.S.C., Section 1983 for the negligent taking of property. In this case, Lehman was found to have intentionally destroyed Weiss' equipment. A jury found that Lehman could not have reasonably believed that his destruction of the equipment was appropriate and in good faith. (Instruction Nos. 22 through 27, Tr. 566-569) The defense of qualified immunity was available to Lehman had the jury found that he had acted in good faith, believing that his destruction of Weiss' property was appropriate and in the course of his official conduct. The availability of qualified immunity was not present in Parratt. Only Congress should enact a principle of law which totally relieves a Federal officer of his individual responsi-

## Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was duly given to the below-named persons by depositing copy of same in the United States mails, first-class, postage prepaid:

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Dated: July 16, 1981.

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bility for intentional wrongdoing. The application of Parratt to this case would destroy the distinction which this Court has drawn between the defenses of absolute and qualified immunity. The Fifth Amendment creates substantive limitations on Federal action which can only be effected by a Bivens-type remedy.

## CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons herein stated.

Respectfully submitted,

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